

## Accessorial Liability<sup>1</sup>

Our law recognizes that two or more individuals can act jointly to commit a crime, and that in certain circumstances, each can be held criminally liable for the acts of the other(s). In that situation, those persons can be said to be "acting in concert" with each other.<sup>2</sup>

Our law defines the circumstances under which one person may be criminally liable for the conduct of another. That definition is as follows:

When one person engages in conduct which constitutes an offense, another is criminally liable for such conduct when, acting with the state of mind required for the commission of that offense, he or she solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.<sup>3</sup>

*NOTE: Add as appropriate* <sup>4</sup>:

Under that definition, mere presence at the scene of a crime, even with knowledge that the crime is taking place, (or mere association with a perpetrator of a crime,) does not by itself make a defendant criminally liable for that crime.

In order for the defendant to be held criminally liable for the conduct of another/others which constitutes an offense, you must find beyond a reasonable doubt:

(1) That he/she solicited, requested, commanded, importuned, or intentionally aided that person [or persons] to engage in that conduct, and

(2) That he/she did so with the state of mind required for the commission of the offense [that is, that he/she acted (e.g. intentionally, recklessly, with criminal negligence)].

If it is proven beyond a reasonable doubt that the defendant is criminally liable for the conduct of another, the extent or degree of the defendant's participation in the crime does not matter. A defendant proven beyond a reasonable doubt to be criminally liable for the conduct of another in the commission of a crime is as guilty of the crime as if the defendant, personally, had committed every act constituting the crime.<sup>5</sup>

The People have the burden of proving beyond a reasonable doubt that the defendant acted with the state of mind required for the commission of the crime, and either personally, or by acting in concert with another person, committed each of the remaining elements of the crime.<sup>6</sup>

*[Note: Add here and/or where the court instructs the jury on the need for a unanimous verdict.*

Your verdict (on each count you consider), whether guilty or not guilty, must be unanimous. In order to find the defendant guilty, however, you need not be unanimous on whether the defendant committed the crime personally, or by acting in concert with another, or both.<sup>7]</sup>

*Note: Add if appropriate:*

As you know, the People contend that the defendant acted in concert with a person who is not here on trial.<sup>8</sup> You must not speculate on the present status of that person. You must not draw any inference from his/her absence. And you must not allow his/her absence to influence your verdict. You are here to determine whether the People have proven beyond a reasonable doubt that the defendant on trial is guilty of a charged crime.<sup>9</sup>

\*\*\*

*NOTE: When this charge is given, it is also necessary to modify the elements of the charged crime(s) to reflect the theory of accessorial liability. The element(s) specifying the prohibited act(s), i.e. the actus reus of the crime, must include language to indicate that the defendant is liable if*

*the prohibited act(s) was performed by the defendant personally or by another person(s) with whom the defendant was acting in concert. The element(s) specifying the culpable mental state requires no modification.*

*An example of an appropriate modification of a charge for murder in the second degree is as follows:*

1. That on or about (date), in the county of (county), the defendant, (defendant's name), personally,<sup>10</sup> or by acting in concert with another person, caused the death of (specify),<sup>11</sup> and
2. That the defendant did so with the intent to cause the death of (specify).

---

1. This accessory charge has been revised twice. On August 3, 2004, this charge was revised by adding the paragraph to which endnote number 7 applies. On July 29, 2002, the charge was revised to reverse the sequence of the two elements listed in the paragraph beginning, "In order for the defendant to be held criminally liable...."

2. The term "acting in concert" is included in this charge in order to create a term that can easily be used in the appropriate element of a charged crime to incorporate by reference the definition of accessorial liability. It is the term used in some counties to charge accessorial liability and its use has been accepted by the courts. *E.g., People v. Rivera*, 84 N.Y.2d 766 (1995).

For those who prefer an alternative term that can serve the same objective, we recommend, "accessory," and recommend substituting the following sentence: "In that situation, each person can be said to be an accessory in the commission of the crime."

3. Penal Law § 20.00. The charge substitutes the term "state of mind" for the statutory term: "mental culpability." The former term is a traditional usage and should be more easily understood. If applicable, the jury should, at this point, also be charged on the provision of Penal Law § 20.15 [see *People v. Castro*, 55 N.Y.2d 972 (1982)], which reads as follows:

---

§ 20.15 Convictions for different degrees of offense

Except as otherwise expressly provided in this chapter, when, pursuant to section 20.00, two or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating fact or circumstance.

4. See *People v. Slacks*, 90 N.Y.2d 850, 851 (1997) (There was no error in the trial court's refusal "to instruct the jury that mere presence at the scene of the crime or association with the perpetrators is insufficient to establish criminal liability, since no reasonable view of the evidence supported such a charge.").

5. If applicable, the jury should, at this point, be charged on the applicable "no defense" provision(s) of Penal Law § 20.05 and/or the "exemption" provision of Penal Law § 20.10. Those sections read as follows:

§ 20.05 Criminal liability for conduct of another; no defense

In any prosecution for an offense in which the criminal liability of the defendant is based upon the conduct of another person pursuant to section 20.00, it is no defense that:

1. Such other person is not guilty of the offense in question owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of the offense in question; or

2. Such other person has not been prosecuted for or convicted of any offense based upon the conduct in question, or has previously been acquitted thereof, or has legal immunity from prosecution therefor; or

3. The offense in question, as defined, can be committed only by a particular class or classes of persons, and the defendant, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity.

§ 20.10 Criminal liability for conduct of another; exemption

Notwithstanding the provisions of sections 20.00 and 20.05, a person is not criminally liable for conduct of another person constituting an offense when his own conduct, though causing or aiding the commission of such offense, is of a kind that is necessarily incidental thereto. If such conduct constitutes a related but separate offense upon the part of the actor, he is liable for that offense only and not for the conduct or offense committed by the other person.

See e.g. *People v Manini*, 79 NY2d 561, 569 (1992) ("If the conduct of the person sought to be held liable as an accomplice constitutes a related but separate offense, that person is liable only for his/her own offense, and not for the offense committed by the principal. Thus, if a person's conduct is of a kind that is "necessarily incidental" to the commission of the other person's offense that person is exempt from accomplice liability, and is criminally liable only for his or her own conduct if it constitutes a related but separate offense." A seller of a controlled substance is criminally liable for the sale but is not also criminally liable as an accomplice in the buyer's possession).

---

6. If the term, "accessory," has been used in lieu of "acting in concert," then, the last paragraph of this charge should read:

"The People have the burden of proving beyond a reasonable doubt that the defendant acted with the state of mind required for the commission of the crime, and either personally, or as an accessory of another, committed each of the remaining elements of the crime."

7. The Court of Appeals has held that the jury need not be unanimous on whether the defendant's criminal liability rest upon personal action or accessorial conduct, and the jury can be so instructed where appropriate. *See People v. Mateo*, 2 N.Y.3d 383 (2004) (the Court approved the following instruction: "Your verdict, as I have mentioned before on each of these charges, has to be unanimous. That means that all twelve have to agree upon a verdict. All twelve of you deliberating on a case do not have to agree that the Defendant was the shooter nor do all twelve deliberating on the case have to find that the Defendant was the commander. It is sufficient that all twelve find the Defendant was either the shooter or the commander under Murder in the First Degree.")

8. If you have used the term "accessory," then the first sentence should read:

"As you know, the People contend that the defendant acted as an accessory of a person who is not here on trial."

9. See Penal Law § 20.05.

10. The term, "personally," used in the example is unnecessary if liability is predicated solely on accessorial liability.

11. If the term "accessory" is used in lieu of "acting in concert," then element one would read:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), personally or as an accessory of another caused the death of (specify); and